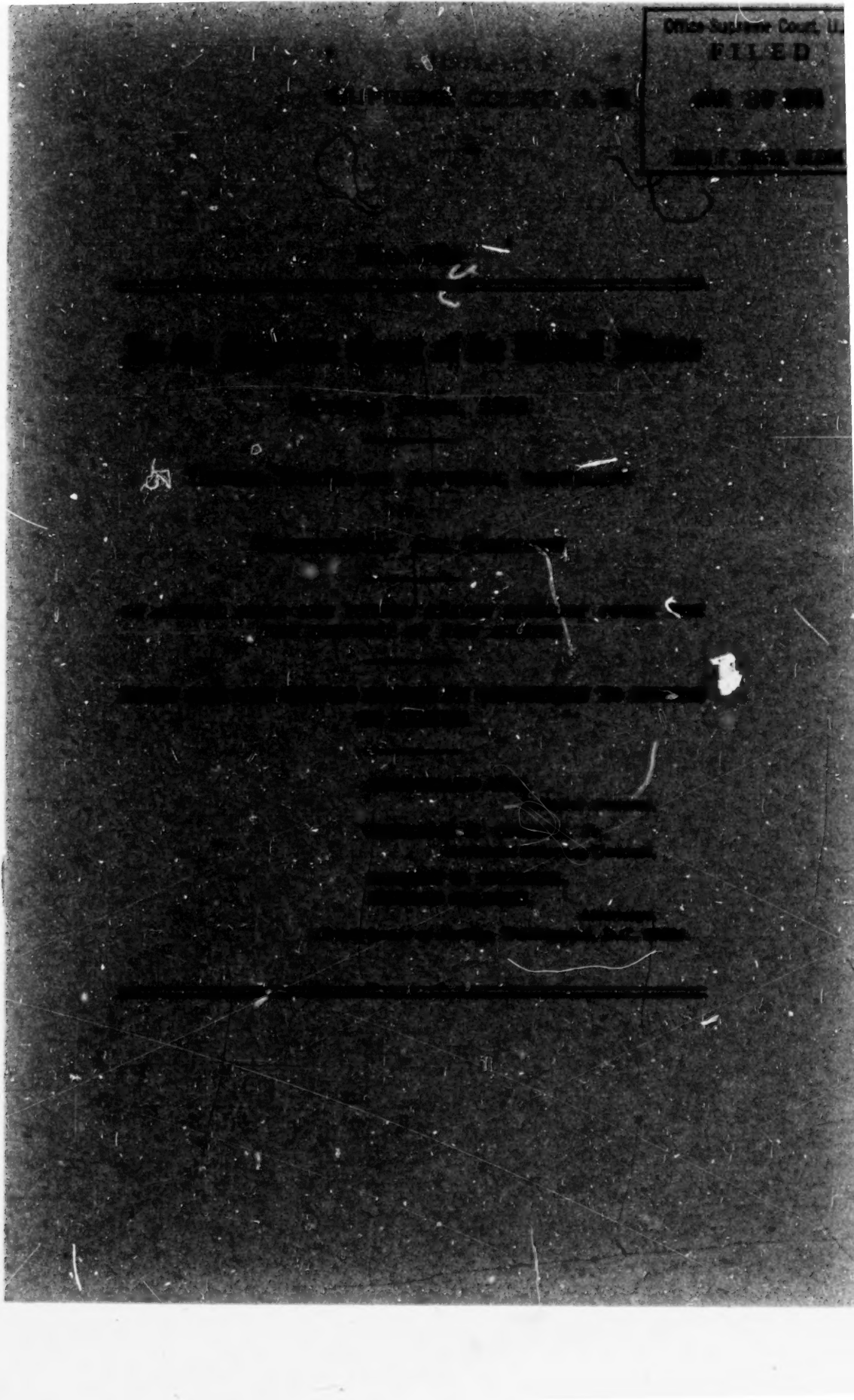
Office-Supreme Court, U.S.
FILED

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 834

UNITED STATES OF AMERICA, APPELLANT

v.

CONTINENTAL OIL COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS

Continental Oil Company (the acquiring company) has moved to dismiss the government's appeal on the ground that Hondo Oil and Gas Co. (the selling company) is a necessary and indispensable party whose absence from the case precludes the entry of judgment against Continental.[1] The motion is not well-founded. The district court added Hondo as a party to this action solely because of Continental's assertions that Hondo's presence might be necessary to permit full relief. Should this Court reverse the

[1] Continental also moved to affirm. We do not respond to that motion here, for we believe the subject to be adequately treated in our Jurisdictional Statement.

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trial court's holding that Continental's acquisition did not violate Section 7 of the Clayton Act, Hondo may again be made a party upon remand for purposes of relief.

The complaint charged that Continental violated Section 7 by acquiring Hondo's refinery at Artesia, New Mexico, together with certain crude oil pipelines and gathering facilities, marketing facilities and trade name. The acquisition of the refinery was in the form of a 20-year lease with option to purchase. Continental was named as the sole defendant, and the complaint asked that Continental be required to establish a new corporation and transfer to it all the assets and rights acquired from Hondo.

Continental moved to add Hondo as a defendant on ground that its presence would be necessary to effect the relief sought by the government (R. 25).[1] The government opposed the motion as premature, pointing out that, if necessary, Hondo could be made a party when the court reached the issue of relief and that Hondo's presence was not necessary to determine whether Continental's acquisition violated Section 7. The district court granted Continental's motion to make Hondo a party defendant, and ordered the government to amend its complaint accordingly (R. 50). The government amended the caption of the complaint but it did not charge Hondo with any violation of law or even ask for any relief involving Hondo (R. 51).

Since then, Hondo has played only a nominal role in the proceedings. It noted an appearance, but filed

[1] R. refers to the unprinted record filed in this Court.

no answer to the complaint (R. 75). It never defended the legality of the acquisition; its participation in the case was limited to its agreeing to the various stipulations between the government and Continental (R. 386, 391). When Continental made a motion for summary judgment on grounds that the undisputed facts showed that it had not violated the law, Hondo did not join in the motion and did not file any motion on its own (R. 407). However, when the court granted Continental's motion, it dismissed the complaint as to Hondo as well (R. 705). Hondo's dismissal was a necessary consequence of the court's ruling that the acquisition did not violate the Clayton Act, for Hondo had been a party only on the theory that its presence might aid in granting relief against Continental if a violation were found. The dismissal did not involve any adjudication as to Hondo because Hondo had never been charged with any violation.[1] Further, since the court held that there had been no violation at all, it obviously had no occasion to determine whether, if there were a violation, any relief against Hondo would be appropriate. In short, the dismissal as against Hondo adjudicated absolutely nothing as to that company.

Accordingly, if this Court should reverse and remand, there is no barrier to joining Hondo as a party once more, if its presence should turn out to be neces-

[1] This fact distinguishes *Re Metropolitan Trust Co.*, 218 U.S. 312, on which Continental places major reliance (Motion, pp. 18-20).

sary to the granting of full relief.[4] The doctrine of *res judicata* would be no barrier for that doctrine bars a second suit only where the cause of action has been previously asserted and adjudicated. *Cromwell* v. *County of Sac*, 94 U.S. 351. Here, of course, no cause of action was ever asserted against Hondo.

Continental's entire argument (Motion, pp. 5–13) that Hondo is a necessary party for determining the merits of the case is based on the erroneous assumption that this is an action for reformation or cancellation of the lease between Continental and Hondo (see Motion, p. 6). But, as noted, that has never been the theory of the government's case; from the beginning, the relief sought was to have Continental assign its rights under the lease to a *new* corporation. Under the terms of the lease agreement, an assignment does not require the consent of Hondo (R. 34); and so it was not made a party defendant originally.

If this Court reverses the district court's judgment dismissing the complaint, and if Continental's acquisition of Hondo's assets is found to have been illegal, we believe that Hondo can again be brought into the case for purposes of relief. If we are wrong in that conclusion, however, that would be merely a factor for the district court to take into consideration in determining the scope of appropriate relief. In

[4] The fact that Continental would remain liable on the lease even after it divests the rights acquired under it does not make Hondo a necessary party (Motion, pp. 5–13). Any question whether to relieve Continental from that obligation is appropriately one to be resolved by the district court after decision on the merits.

either contingency, however, the fact that the government did not appeal from the dismissal of Hondo cannot possibly prejudice Continental in litigating the only issue now before this Court: whether the district court erroneously held that on the record Continental's acquisition did not violate Section 7 of the Clayton Act. There is no issue as to relief before this Court, and Hondo is not a necessary party to the determination of the substantive issues which this appeal involves.

For these reasons we respectfully submit that Continental's motion to dismiss should be denied.

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